

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARTNER GROUP, INC.	:	DETERMINATION
	:	DTA NO. 807983
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through February 28, 1988.	:	

Petitioner Gartner Group, Inc., 56 Top Gallant Road, Stamford, Connecticut 06902 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 28, 1988.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 1, 1991 at 9:00 A.M. Petitioner provided additional documentation on March 13, 1992. The parties were provided until May 22, 1992 to file briefs. Petitioner appeared by Hutton & Solomon (Kenneth I. Moore, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner has established that an audit-based assessment should be reduced due to claimed overlapping audits of petitioner's customers, claimed exempt sales and/or the possession by certain customers of direct payment permits.

FINDINGS OF FACT

Petitioner, Gartner Group, Inc. ("Gartner"), performs market research in various segments of the information processing industry. The results of the firm's research and analysis are sold to clients, by way of subscription, in the form of publications referred to as bi-weekly Research Notes and periodic Strategic Analysis Reports. Petitioner has been in business since 1979 but maintained offices in New York City only during the first year of operations.

Subsequently, Gartner has operated exclusively out of its Connecticut offices. Gartner was registered with New York State as a sales tax vendor and filed sales and use tax returns up to and including the quarter ended February 28, 1988, when a final return was filed and its sales tax registration cancelled.

Gartner solicits business within New York State through several channels. It advertises its services in publications such as Forbes and the Wall Street Journal and uses direct mailing via acquired customer lists. Gartner also sponsors conferences directed at prospective clients for purposes of presenting the available services and products of the firm, and additionally distributes samples of its publications at various trade shows and exhibitions. In addition, Gartner sends sales representatives into New York State to directly call on selected prospective clients.

Petitioner did not charge sales tax to its clients during the period March 1, 1984 through November 30, 1986. Instead, Gartner allocated and reported 10% of gross client fees as taxable sales attributable to the publications, and remitted this amount directly out of the gross receipts. The balance of revenues from client fees was allocated as tax-exempt research and consulting income. After the period ended November 30, 1986, petitioner ceased reporting any taxable sales in New York State.

Following the Division of Taxation's ("Division") auditor's determination that petitioner's sales records were adequate, the parties executed an Audit Election Method Agreement form. The auditor tested Gartner's sales for the period June 1, 1986 through August 31, 1987 using the client billings worksheets and accompanying invoices. The following distribution of sales revenues was determined:

Subscriptions	90.04%
Reprints	.52%
Consulting	6.58%
Presentations	1.21%
Exempt Organization Sales	<u>1.65%</u>
Total Percentage	100%

The auditor combined the sales of subscriptions and reprints to arrive at an audited taxable percentage of 90.56%. This percentage was applied to New York State gross sales for the audit

period to arrive at audited taxable sales. Additional taxable sales of \$9,742,252.94 were determined by subtracting reported taxable sales from audited taxable sales. The additional tax due of \$750,526.54 was arrived at by applying the various jurisdictional tax rates to the appropriate amounts of additional taxable sales.

On May 19, 1987, August 13, 1987, November 5, 1987 and May 27, 1988, petitioner executed a series of consents having the effect of extending the period of limitations for assessment of sales and use taxes for the period March 1, 1984 through May 31, 1985 to September 20, 1988. On November 10, 1988, petitioner executed a consent which extended the period of limitations for assessment of sales and use taxes for the period September 1, 1985 through February 28, 1986 to June 20, 1989.

On September 20, 1988, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner for the period March 1, 1984 through August 31, 1985 assessing a sales tax liability of \$197,748.91, plus penalty (Tax Law former § 1145[a][1]) and interest. On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner for the period June 1, 1985 through August 31, 1985 assessing a penalty (Tax Law § 1145[a][1][vi]) of \$2,106.22.

On March 17, 1989, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner for the period September 1, 1985 through February 28, 1988 assessing a sales tax liability of \$552,777.39, plus penalty (Tax Law § 1145[a][1][i]) and interest. On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gartner spanning the same period and assessing penalty (Tax Law § 1145[a][1][vi]) of \$55,277.73.

Petitioner concedes that the transactions at issue are information services subject to the imposition of sales tax under Tax Law § 1105(c)(1). Petitioner also concedes the audit findings with respect to the amount of gross sales, the taxable sales percentage (computed on the basis of a test of sales for the period June 1, 1986 through August 31, 1987) and the amount of sales reported by petitioner.

Petitioner seeks a reduction of its sales tax liability as a vendor on the above-stated transactions on the following grounds: (1) overlapping audits; (2) exempt sales; and (3) direct payment by petitioner's customers. Petitioner also seeks credit against the sales tax liability for the \$129,999.23 in checks submitted to the Division.

In support of its position, petitioner submitted copies of customer invoices for the audit period and a summary sheet showing the computation of the tax attributable to each invoice. In support of its position relating to the issue of overlapping audits, petitioner introduced letters from its customers concerning New York State sales and use tax field audits that had been conducted for periods during which the customers had made purchases from Gartner. The contents of the letters can be divided into four categories:

(a) The following customers' letters indicate that they had been audited for the same audit period and had agreed to or paid the audit findings. In addition, six of the customers' (*) letters are accompanied by a signed consent fixing the tax due:

AT & T	National Westminster Bank
Bankers Trust Company	G.E. - Knolls Atomic Power Lab
Barrons (Dow Jones)	Irving Trust (Bank of New York)
CBS, Inc. *	Manufacturers Hanover
Chase Manhattan Bank	McGraw-Hill*
Ciba-Geigy	Metropolitan Life Insurance
Citicorp	Morgan Guaranty Trust
Citicorp NA, Inc.	Morgan Stanley
Computer Associates	MSC, Inc.
Computer Consoles, Inc.	New York Times
Consolidated Edison	Paine Webber
Continental Insurance*	Paramount Pictures
Corning Glass	Pepsico
Dillon Read & Co., Inc.	Philip Morris
Ernst & Young	Salomon Bros.
E. F. Hutton	Siemens Info Systems
Equitable Life Assurance	SIAC*
European American Bank	Union Pacific*
First Boston Corporation	United States Trust
Forbes*	United Technologies

The letters indicate that either the tax due on the transactions with Gartner was paid as part of the agreement with New York State or that there was no agreement to exclude the transactions with Gartner from the audit.

(b) The following letters indicate that the customers are currently being audited for

the same audit period:

Avon Products, Inc.
Bear Sterns
Coopers & Lybrand
General Foods (Kraft)
IBM
Information Builders
ITT Corporation
Lehman Bros.

Manufacturers & Traders
Marine Midland Bank
Merrill Lynch
Shearson Lehman
Sprout Group (DLJ Inc.)
Xerox
Young & Rubican, Inc.

(c) The letters of the following customers indicate that the customers were audited for the same audit period as petitioner but do not state whether the customer agreed to the audit findings:

Goldman Sachs & Co.
Grumman Data Systems
Joseph Seagram
Mobil Corp.

Mobil Oil Corp.
NBC
NEC America, Inc.

The letter from Grumman Data Systems further states that for the audit covering the period March 1, 1984 through August 31, 1987, "the issue at hand was not assessed."

(d) The following customers indicate in their letters that they had been audited for the same period and had protested some or all of the audit findings. Where there is a partial consent, there is no indication whether it covers the same invoices as in the audit at issue:

Eastman Kodak

F. W. Woolworth

The Division concedes that the following customers are exempt organizations whose purchases from petitioner are not subject to the imposition of sales tax:

Blue Cross/Blue Shield (Empire)
Federal Reserve - New York
Port Authority of New York and New Jersey

Gartner also claims that the Metropolitan Transit Authority is an exempt organization.

Petitioner alleges that sales to two of its customers are exempt from sales tax because delivery occurred outside New York State. In support of its position, petitioner produced a letter from the Assistant Manager - Corporate Taxes of The Penn Central Corporation. The letter states that Penn Central had moved its corporate offices from New York City to Greenwich, Connecticut on April 1, 1984 and the consulting services purchased from petitioner

would have been used in Connecticut rather than New York. The letter further states that although the bills in question were mailed to the New York City address, they were processed and paid from Connecticut. In addition, a letter from a tax partner of Deloitte & Touche was introduced into the record. The letter indicates that Touche Ross & Co. had subscribed to several services provided by Gartner which permitted Touche Ross & Co. to designate two interfaces or individuals to receive printed reports. The letter further indicates that for each subscribed service Touche Ross designated two individuals, one in New York City and one outside New York State, to receive copies of the printed reports.

Gartner's sales invoices to both The Penn Central Corporation and Touche Ross & Co. listed the customers' addresses as being in New York City.

Petitioner introduced into the record of this matter a letter dated May 28, 1991 from the Brooklyn Union Gas Company which advises Gartner that Brooklyn Union Gas had a New York State Direct Payment Permit for sales and use taxes and that Brooklyn Union Gas had paid use tax on its purchases from Gartner with its October 1987 Use Tax Report. Attached to the letter was the Direct Payment Permit and a copy of Brooklyn Union Gas' Use Tax Accrual Report for October 1987 showing the invoice number, amount and use tax amount relating to its transaction with petitioner. Direct Payment Permits were also presented by The Gleason Corporation, The J. C. Penney Company, Inc., and Pepsico.

During the course of the proceedings in this matter, petitioner submitted to the Division checks from various purchasers representing the sales tax due on some of the transactions at issue. The customers and the amounts submitted are as follows:

<u>CUSTOMER</u>	<u>AMOUNT</u>
Avon Products, Inc.	\$ 4,108.00
Bristol-Myers	1,361.00
Clarendon Group	1,815.00
Group W Cable	908.00
MONY Financial	8,357.02
New York Life Insurance	11,973.00
Norstar Data Services	10,290.00
NYNEX	44,068.62
Olivetti	8,664.00
Schroder Leasing Corp.	895.00

Swissre Holding - North America	17,320.87
Touche Ross & Co.	6,500.00
TRW	3,142.72
Union Pacific	10,596.00
	<u>\$129,999.23</u>

CONCLUSIONS OF LAW

A. The Division's audit policy relating to overlapping audits is contained in a memorandum dated November 4, 1988 from the Sales Tax Audit Administrator to District Office Sales Tax Audit Personnel, captioned "Overlapping Audits." This memorandum indicates that for a vendor to obtain an audit adjustment based on an overlapping audit of the vendor and his customer, the vendor must establish the audit period of the purchaser, that the purchaser agreed to the audit findings and that there was no agreement to exclude the particular transactions at issue from the audit of the customer. Therefore, it is the Division's policy to reduce a vendor's assessment for any amount assessed on sales to a particular customer if the customer was audited and agreed to the audit findings for the same audit period (Matter of Allied Aviation Serv. Co. of N.Y., Tax Appeals Tribunal, June 27, 1991).

Based upon the Division's audit policy regarding overlapping audits, it is found that petitioner is entitled to an adjustment to the audit findings as to the customers listed in Finding of Fact "8(a)", in that petitioner has established through the customers' letters and supporting documents that these customers were audited and agreed to the audit findings for the same audit period. The information in the letters was verifiable by the Division through its own records. The lack of evidence in the record contradicting the customers' letters is further support of petitioner's position.

Petitioner is not entitled to an adjustment to the audit findings with regard to the customers listed in Finding of Fact "8(b)", "8(c)" or "8(d)". The information relating to these customers does not meet the requirements of the Division's audit policy as the audits were either ongoing and not, as yet, agreed to ("8[b]"), were complete but not agreed to ("8[c]") or were being protested ("8[d]").

B. In addition to the customers which the Division concedes are exempt organizations

whose purchases from petitioner are not subject to the imposition of sales tax (Finding of Fact "9"), the audit findings are to be adjusted as well for the Metropolitan Transit Authority, which is also an exempt organization whose purchases are not subject to sales tax (Public Authorities Law § 1275; Tax Law § 1116[a][1]).

C. Petitioner is not entitled to audit adjustments concerning the transactions involving The Penn Central Corporation and Touche Ross & Co. on the claim that delivery of petitioner's services occurred outside New York State. In these situations, the letters alone are insufficient to establish delivery outside the State. The Division, through its own records, could not verify this information as it could with the overlapping audits and the letters are contradicted by petitioner's invoices to the two customers showing addresses within the State. Furthermore, the services provided by Gartner to Touche Ross & Co. were in fact delivered in New York State.

D. The receipt by petitioner of Direct Payment Permits from several of its customers after the time to assess the customers had expired does not relieve petitioner of its obligation to collect and remit the sales tax due on these transactions. Petitioner would have been relieved from the obligation to collect sales tax from the customer if it had received a Direct Payment Permit at the time the transactions at issue occurred (Tax Law § 1132[c]; 20 NYCRR 532.5[a]). To relieve Gartner from its responsibility at this time would place the Division in the position of being unable to collect the sales tax from either petitioner, due to its receipt of the Direct Payment Permit, or the customer, due to the running of the statute of limitations. Such a result is untenable.

The documentation presented by petitioner relating to its transaction with the Brooklyn Union Gas Company is sufficient to entitle petitioner to an adjustment to the audit findings. The letter from Brooklyn Union Gas, its Direct Payment Permit and the copy of its use tax accrual report showing the invoice number, amount and use tax are sufficient to establish payment of the tax due.

E. Petitioner is entitled to a tax credit of \$129,999.23 against the sales tax ultimately determined to be due based upon the submission of checks from various customers representing

the sales tax due on some of the transactions at issue.

F. The petition of Gartner Group, Inc. is granted to the extent that the notices of determination and demands for payment of sales and use taxes due issued September 20, 1988 and March 17, 1989 are to be modified as indicated in Conclusions of Law "A", "B", "D" and "E". The petition is, in all other respects, denied.

DATED: Troy, New York
January 21, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE